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No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

ANDRADE'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT

In the opening brief on the merits, Petitioner argued Andrade's sentence is not one of the exceedingly rare terms of imprisonment prohibited by the Eighth Amendment as cruel and unusual punishment. In response, Andrade generally acknowledges the principles Petitioner relied upon, but nevertheless argues there is an inference of gross disproportionality here which is validated by intra-jurisdictional and inter-jurisdictional comparisons. In support of his arguments, Andrade primarily relies on *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L. Ed. 2d 637 (1983), and *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), and tries to distinguish the instant matter from *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L. Ed. 2d 382 (1980), and *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L. Ed. 2d 836 (1991).

As to *Solem*, Andrade maintains his crimes are very similar to the crimes the defendant committed there, in that in neither case was there any violence or threat of violence, both cases involved relatively small amounts of money, and both cases involved crimes society views as among the less serious offenses. In addition, he claims, given his age and life expectancy, the sentence he received - 50 years to life with a minimum of 50 years before parole eligibility - is the functional equivalent of the life without parole sentence the defendant in *Solem* received.

As to *Rummel*, Andrade maintains the principal feature that distinguishes that case from the instant matter is that in *Rummel*, although the defendant received a life sentence, Texas had a liberal parole policy which meant Rummel would

be eligible for parole in twelve years. *See, Rummel*, 445 U.S. at 280-81; *see, Solem*, 463 U.S. at 297.

As to *Harmelin*, Andrade argues there are two features distinguishing that case from the instant matter. First, Andrade argues, his crimes of petty theft with a prior did not pose the grave risk of harm to society that Harmelin's possession of enough cocaine to potentially yield 32,500 to 65,000 doses did, yet he received essentially the same sentence. Second, citing Justice Kennedy's observation in *Harmelin* that the Michigan law involved there provided clear notice of the consequences of possession of drugs, Andrade argues the sentencing scheme in the instant matter did not provide clear notice to him, and the complexity of the scheme obscured the possible sanctions for the crime. In support of his argument he notes that at the time of his offenses no published case had held a defendant could get two strikes from a single past case, that the California Supreme Court had not settled the question of whether consecutive sentences are required for multiple current offenses, and that it had not yet been determined how much of a 25-year to life sentence a convicted defendant would have to serve before being eligible for parole. Resp's. Brief, at 17-18, fn. 4. Third, relying on the fact that, in *Harmelin*, seven justices endorsed the principle that grossly disproportionate sentences are unconstitutional, Andrade engages in intra-jurisdictional and inter-jurisdictional comparisons which he claims further demonstrates his sentence is grossly disproportionate.

Andrade's arguments are without merit. Proportionality review does not apply to term-of-years sentences. Nevertheless, assuming for the sake of argument that proportionality review does apply to term-of-years sentences, in light of the general principles of such review, the instant sentence is constitutional. In addition, Andrade's arguments should be rejected because they are fundamentally flawed in that the instant matter is distinguishable from *Solem* and *Atkins*, and is most similar to *Rummel*, where this Court rejected a challenge to the proportionality of a term-of-years sentence.

A. Proportionality Review Should Not Apply To Term-Of-Years Sentences, And If It Does, The Fundamentl Principles Of Review Render The Instant Sentence Constitutional

First, it must be recognized that Andrade's sentence is entitled to increased deference because it involves a sentence mandated by the state legislature rather than a trial judge's discretionary sentencing choice. Andrade's sentence is the result of a scheme narrowly tailored so as to apply only to those persons convicted of a felony and who have previously been convicted of two or more serious or violent offenses. Additionally, the scheme does not involve a life without parole sentence, but rather offers the real possibility of parole. Moreover, the scheme includes a safety valve whereby the sentencing court can exercise discretion and dismiss the prior conviction allegation(s).

Thus, the scheme is sufficiently narrowed so that no sentence within its parameters may be characterized as "grossly disproportionate" and thereby unconstitutional. Deference to the will of the People as reflected in the sentencing scheme selected by them strikes a proper balance between the People's historically broad policy making authority and the federal judiciary's limited power to override the People's power to punish crime.

Besides, Andrade's argument is based on an incorrect premise. Andrade persistently refers to his conduct as "petty theft." By doing so, Andrade tries to minimize his conduct as something less than a felony. In other words, he seems to suggest that his current misconduct is all that counts and his status as a recidivist is substantively meaningless. The People of the State of California, however, have determined that in light of the fact that Andrade was previously convicted of a theft-related offense, his current conduct may be classified as a felony. The People of the State of California, or for that matter the people of any State, have a right to conclude a defendant's prior convictions demonstrate the instant conviction evidences

such a persistent refusal to remain law-abiding that it may properly be classified as a felony.[1]

In any event, proportionality review should not apply to term-of-years sentences in the first place, because to do so requires a deviation from the fundamental principle that proportionality analysis should be based on objective factors to the maximum extent possible. As this Court noted in *Hutto v. Davis*, 454 U.S. 370, 373, 102 S.Ct. 703, 70 L. Ed. 2d 556 (1982), citing *Rummel*, 445 U.S. at 275, the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make any constitutional distinction between one term of years and another.[2]

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1. Moreover, Andrade's chronic reference to his crimes as "petty theft" seems to ignore the fact that "petty with a prior" is not the only such crime which could result in a third-strike sentence. For example, in California possession of a concealed firearm without a permit is a wobbler, i.e., punishable as either a misdemeanor or a felony. Calif. Pen. Code, §§ 12020(a)(1) and 12020(b)(8). Nevertheless, possession of a firearm by a person who has been previously convicted of a felony is a felony. Calif. Pen. Code, § 12021(a)(1). Thus, a defendant previously convicted of two burglaries and currently convicted of possession of a firearm would be subject to the same sentencing as Andrade.

2. Citing *Solem*, 463 U.S. at 289, Andrade argues it is anomalous to find excessive fines and the death penalty subject to proportionality analysis yet not do so with regard to prison terms. Resp's. Brief, at 12, fn. 2. But the framers of the Constitution were well aware of the concept of requiring a sentence to be proportionate to the nature of an offense, yet chose not to expressly include that requirement in the Bill of Rights. *See, Harmelin*, 501 U.S., at 977-78 (Scalia, J, dissenting.).

B. Andrade's Attempts To Rely On *Solem* And *Atkins*, And Distinguish *Rummel* And *Harmelin*, Are Flawed

Andrade's arguments must also be rejected because they are substantially flawed in a number of respects. First, his reliance on *Solem* is misplaced. The value of the property in question is hardly decisive. The significant factors in *Solem* were that the crime was indisputably passive, i.e., uttering a no-account check, the defendant's prior offenses were all relatively minor, i.e., three third-degree burglary convictions, obtaining money under false pretenses, larceny, and a third-offense driving while intoxicated, and the sentence was life without the possibility of parole.

Here, conversely, Andrade's crimes were not passive; they were active, involving the theft of property from the direct possession of the rightful owners. In addition, his prior offenses, including three first-degree burglary convictions for residential burglary, are serious, both factually and legally. Finally, Andrade's sentence provides for the possibility of parole. The argument that he might not live long enough to see that day is entirely speculative and eccentric to this offender.

As to *Harmelin*, Andrade's reasoning gives little, if any, weight to the fact that the sentence there was life without the possibility of parole. Here, however, parole is available.

Moreover, Justice Kennedy's comments, concerning the clarity of the notice the Michigan sentencing scheme provided, were addressed to a challenge to the mandatory nature of the scheme, and in support of his ultimate conclusion that the Michigan scheme was as fair, if not more so, than schemes in which the sentencing authority's discretion, or the complexity of the scheme, obscured the possible consequences. The mandatory nature of California's scheme is not an issue here. Moreover, as Justice Kennedy noted, this Court has never invalidated a legislatively-mandated penalty based solely on the length of sentence, and that the arguments for or against particular sentencing schemes are for legislatures to resolve.

Id., 501 U.S. at 1001-1007. Regarding individualized sentencing, Justice Kennedy further noted the Michigan scheme provided mechanisms for consideration of individualized circumstances, and that prosecutorial discretion before sentencing, as well as legislative and executive clemency procedures afterwards, provided means by which the state could avert or correct unjust sentences. *Id.*, at 1008. Similar mechanisms exist in California's scheme.

In any event, Andrade presumes the "narrow proportionality principle" Justice Kennedy referred to applies to a term of years sentence. The reference, however, is easily understood as applying only to capital cases and sentences of life without the possibility of parole. In fact, this inference is more reasonable in light of *Rummel*, as well as Justice Kennedy's observation that this Court has never invalidated a legislatively mandated penalty solely on the basis of the length of sentence. *Harmelin*, 501 U.S. at 1006-1007.

Thus, although the facts of this case bear some resemblance to both *Rummel* and *Solem*, it is most similar to *Rummel*. And in the *Solem* opinion, this Court said *Rummel* controls on similar facts. *Solem*, 463 U.S. at 304. Nevertheless, Andrade tries to distinguish *Rummel* on two grounds. First, he claims the conduct in *Rummel* was felonious whereas the conduct here was misdemeanor in nature. As previoulsy discussed, however, Andrade is wrong as a matter of law. Moreover, in *Rummel*, the amount of money taken was $120.75, and the taking was accomplished by false pretenses. Here, the value of the property taken was $153, and the taking was accomplished by theft. For constitutional purposes, there is simply no meaningful difference between the conduct in the two cases.

Second, Andrade claims Texas' liberal parole policy distinguishes *Rummel* from the instant matter. But the liberal parole policy only meant Rummel would be eligible for parole in twelve years. It did not mean he would necessarily receive parole. Moreover, if Andrade had committed only the same

number of offenses as Rummel did (one), he would have been eligible for parole in 25 years. In other words, Andrade's sentence appears more onerous because his conduct was more onerous. Finally, Andrade cites no authority (and Petitioner can find none), supporting the proposition that Andrade's Constitutional rights were violated by a sentencing scheme which limits parole eligibility in the manner chosen by the People of the State of California. As compared with *Rummel*, there simply is no Constitutional defect in the sentence in this case.

In addition, Andrade's intra-jurisdictional and inter jurisdictional comparisons are flawed. On an intra-jurisdictional basis, Andrade compares his sentence to the sentence a first time offender would receive in California were he convicted of two counts of petty theft with a prior. Resp's. Brief, at 18-20. The correct intra-jurisdictional comparison, however, is not between recidivists and non-recidivists who commit the same offense, but rather between the sentence imposed for the subject offense and sentences imposed on other criminals for different offenses. *Solem*, 463 U.S. at 292-294. And, as demonstrated in Petitioner's opening brief, that proper comparison suggests Andrade's sentence is not at all disparate. Petr's. Brief on the Merits, at 20-21.

Moreover, in support of his intra-jurisdictional comparison, Andrade argues that if his prior convictions had been for violent crimes, such as murder or manslaughter, the maximum punishment he could have received for the instant offenses would have been one year in prison, because there were no prior theft-related offenses. Resp's. Brief, at 19. Andrade's point is irrelevant. His prior theft-related crime rendered the instant offense a felony, and Andrade had notice of that rule of law. Therefore, the potential sentence he might have received had his instant offenses been misdemeanors has no bearing on the proper comparison between his sentence and the sentences other defendants would receive for different felony offenses.

Andrade's inter-jurisdictional comparison also is based on an incorrect factual predicate. Citing *Riggs v. California*, 525 U.S. 1114 (1999), Andrade claims California is the only state in which a misdemeanor offender could receive such harsh punishment. Resp's. Brief, at 20. But Andrade did not commit a misdemeanor, he committed a felony. Characterizing Andrade's offense as a misdemeanor ignores the California Legislature's plenary authority to define what constitutes a felony in California.

Andrade's argument also ignores Justice Holmes' caveat in his dissenting opinion in *Lochner v. New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 49 L. Ed. 937 (1905), that in a federal system, absent a constitutionally imposed uniformity contrary to traditional concepts of federalism, one state will inevitably treat particular offenders more severely than all other states do. *See, People v. Mantanez*, 98 Cal.App.4th 354, 365 (2002) (federalism only extends to those within the extremes, and the extremes are automatically suspect). And accepting Respondent's reasoning would be tantamount to judicially imposed federal sentencing mandate compelling uniformity and a constant downward trend in sentence length.

Andrade also invokes this Court's recent decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). Andrade notes that in *Atkins*, this Court emphasized the fact that because a majority of states prohibit the execution of retarded persons, there is a consensus that such punishments are cruel and unusual. Relating that statement to the instant matter, Andrade argues no State other than California would permit the same sentence imposed here. Resp's. Brief, at 21-23. Andrade seems to be implying that except for California, there is a consensus among the States that sentences such as the one Andrade received are grossly disproportionate. Andrade's point ignores the fact that four other states have schemes reasonably similar to California's. It also ignores the fact that in *Atkins*, this Court relied on a trend it found had been emerging since approximately 1990. *Atkins*, 122 S.Ct., at 2248-50. There is no

similar emerging trend regarding recidivist sentencing. In fact, the opposite is true.

In support of his general assertion that proportionality review applies to term-of-years sentences (Resp's. Brief, at 14), Andrade also relies on the *Atkins* opinion's acknowledgment that the Eighth Amendment draws its meaning from the evolving standards of decency which mark the progress of a maturing society, and that the clearest and most reliable evidence of contemporary values is legislation enacted by the country's legislatures. *See Atkins*, 122 S.Ct. at 2247. But this Court has applied the "evolving standards" test to the methods of punishment, not to the length of a particular sentence. Moreover, society's sense of decency will inevitably be influenced by contemporary events. Thus, Petitioner respectfully submits, Andrade's argument should be rejected because the "evolving standards" test provides no useful basis for analyzing the proportionality of a term-of-years sentence.

Citing empirical studies concerning the effects of California's three-strikes law, Andrade further claims that Petitioner offers no evidence that punishing shoplifting with life sentences serves a rational purpose. Resp's. Brief, at 28-29. Andrade misses the point. Petitioner is not required to substantiate the purpose of the Three-Strikes law with empirical evidence in order for Andrade's sentence to be held constitutional. Substantiating the purpose of the law is the domain of the legislature in debating policy issues. Petitioner's opening brief on the merits only discussed the rational purpose behind the law in order to explain why the California Legislature, as well as the citizens of California, thought the law was necessary in the first place.

In any event, the rationality of the law cannot be confined to the question of whether imposing life sentences on shoplifters is rational or not, because that is not what happened here; more is involved. Andrade is a recidivist who has committed serious offenses. Thus, the proper analysis goes to the question of whether imposing life sentences on career

criminals is rational or not. And, in addressing that question, judicial deference should be at its apex. It is difficult enough to evaluate the proportionality of a sentence when one crime is at issue. If the instant crime is aggravated by prior offenses, however, and those priors indicate a resistance to rehabilitation, greater moral culpability, and a greater risk to community, reviewing courts are being asked to make decisions virtually indistinguishable from the legislature's policy making.

Moreover, implicit in Andrade's argument is a claim that only another serious or violent felony should result in a life sentence. Such an argument inherently concedes such a sentencing scheme would be rational. But the choice of the People in prescribing that any felony is enough to warrant a life sentence is no less rational; it is just not to Andrade's liking.

Andrade makes another point which Petitioner submits is flawed. In a sort of alarmist fashion, he argues that what California has done is tantamount to making overtime parking punishable by life imprisonment. Resp's. Brief, at 24. Andrade is incorrect. His assertion ignores his felony recidivism. Besides, it goes without saying that overtime parking constitutes an inconvenience on society, whereas serial theft by a person known to have committed serious felonies poses real burdens and risks.

Andrade's overall reasoning should be rejected on an additional basis. If endorsed, it would mean subjective, rather than objective, factors would form the basis for proportionality analysis in terms of years cases. A state will be precluded from incapacitating any defendant whose sentence exceeded his life expectancy unless the subject offenses comport with the reviewing court's subjective opinion as to the seriousness of the offense. At some point, however, a state must be able to isolate an habitual criminal from society for long periods of time. There is nothing constitutionally significant about a third felony offense. California could just as easily have drawn the line at a second offense, or a fifteenth. Andrade's criminal history clearly reveals he will chronically reoffend. What greater

evidence could there be of Andrade's chronic criminalism, and the associated burden his incorrigibility places on society, than the fact that he was arrested, released, and two weeks later he offended again. If Andrade's reasoning were accepted, however, California would be precluded from incapacitating him, or others like him, after a tenth, or a fifteenth, or a twentieth petty with a prior, despite the fact that the offenders have demonstrated they are chronic felons who will commit serious offenses and are unwilling to remain law-abiding. A reviewing court might subjectively determine the triggering offense is not serious enough, or the criminal history is not serious enough, or the defendant is too old, or the defendant is in too poor a state of health, to merit the punishment prescribed by law. Such reasoning provides no objective basis for conducting a sentencing scheme.

Finally, Andrade rejects Petitioner's proposed test, of limiting the "exceedingly rare" instances of unconstitutional sentences in non-capital and non-life-without-parole cases to those not susceptible to debate among reasonable minds. Andrade argues such a test is contrary to this Court's holding *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L. Ed. 2d 389 (2000), provides no limiting principle, and would replace the three-part test of *Solem*. Andrade's argument is incorrect in all respects.

First, as Justice Kennedy explained in *Harmelin*, there is no three-part test. *Solem* provides a one-part test which may be validated by other considerations.

Second, Petitioner's proposal is not contrary to *Williams*. In *Williams*, this Court rejected an all reasonable jurists test for federal habeas review of the reasonableness of a state court's merits determination, because it would have established a unanimity requirement, and a subjective, rather than objective, standard for reasonableness.[3] *Williams*, 529

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3. Andrade doubts any reasonable person would believe

U.S. at 377-78, 409-10. But that is a different standard than a "not susceptible to debate" standard. Indeed, although this Court rejected an "all reasonable jurists" test in *Williams*, in *O'Dell v. Netherland*, 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L. Ed. 2d 351 (1997), this Court essentially endorsed the test as a standard of objective reasonableness. *See, Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 108 L. Ed. 2d 307 (1990) (stating test articulated in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L. Ed. 2d 334 (1989), is whether a rule is susceptible to debate among reasonable minds).

Finally, the proposed test does provide a limiting principle. As this Court noted in *Williams*, although the term "unreasonable" is difficult to define, it is a common legal term and federal judges are familiar with its meaning. *Williams*, 529 U.S. at 365.

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an indeterminate life term, with no parole for 50 years, is anything other than grossly disproportionate when imposed for shoplifting videotapes. Resp's. Brief, at 31. The dissent in *Andrade v. Attorney General of the State of California*, 270 F.3d 743 (2001) and the majority in *People v. Mantanez*, 98 Cal.App.4th, at 354, disagree.

II.

THE STATE COURT'S MERITS DETERMINATION DID NOT INVOLVE AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT

In the opening brief on the merits, Petitioner argued Andrade was not entitled to federal habeas relief because the State court's merits determination did not involve an unreasonable application of this Court's clearly established precedent. In response, Andrade argues the State court decision was both contrary to, and involved an unreasonable application of, this Court's clearly established precedent.

As to the "contrary to" prong, Andrade argues this Court's decisions clearly establish the constitutionality of his sentence should be determined using the *Solem/Harmelin* framework. He maintains that because the State court opinion questioned whether proportionality analysis even applied, the State court essentially disregarded the test prescribed in *Solem* and *Harmelin*, and applied only *Rummel*, and therefore the State decision was contrary to this Court's precedent. Resp's. Brief, at 33-37.

As to the "unreasonable application" prong, Andrade says a 50-years-to-life sentence is clearly grossly disproportionate, and therefore the State court determination upholding the sentence unreasonably applied federal law. Resp's. Brief, at 37-38. Andrade further argues that Petitioner's proposal as to how to define the term "objectively unreasonable," is identical to the definition rejected in *Williams*. Resp's. Brief, at 32-39.

Andrade's arguments must be rejected for several reasons. First, Andrade's assertion, that this Court's decisions clearly established his sentence had to be analyzed using the *Solem/Harmelin* framework, is incorrect. *Solem* and *Harmelin*

involved life without parole sentences, whereas the instant matter and *Rummel* involved indeterminate life sentences, and *Solem* said *Rummel* controls in similar factual situations. Therefore, it was unclear whether the *Solem* test, as refined by *Harmelin*, applied at all in this case.

Second, the application of the Eighth Amendment to non-capital cases, particularly those involving non-violent triggering offenses resulting in life sentences, is anything but clear. Whether federal law is clearly established for § 2254 purposes depends on whether a rule is dictated by precedent at the time the defendant's conviction became final. In other words, does a survey of the existing legal landscape show reasonable jurists might differ on the outcome? If so, the rule was not clearly established. *See, Williams*, 529 U.S. at 381.

In this Court's proportionality analysis cases, however, *Rummel* reached one conclusion while *Solem* reached another. Moreover, writing in dissent, Chief Justice Burger said *Solem* could not be rationally reconciled with *Rummel* (*see, Solem*, 463 U.S. at 304 (Burger, C.J., dissenting). Further, in *Harmelin* the lack of clarity was more evident. Justice Scalia observed *Solem* was not an expression of clear law (*Harmelin*, 501 U.S. at 965), and Justice Kennedy commented that this Court's proportionality decisions have not been entirely clear or consistent. *Id.*, at 996-98. In addition, Justice Kennedy noted this Court has never invalidated a legislatively mandated sentence based on the length of sentence alone. *Id.*, at 1006-07.

Third, the State court did not disregard *Solem* and *Harmelin*. It simply noted that another division of the same court had questioned *Solem's* continued validity. The State court then found the instant case to be most similar to *Rummel*, but was silent as to whether that finding was based on the life without parole versus term of years distinction, or some other basis. App. E, to Pet for Writ of Certiorari, at 76-77.

As to the "unreasonable application" prong, Andrade argues a 50-years to life sentence is clearly disproportionate, and therefore the State court's determination upholding the

sentence unreasonably applied federal law. Resp's. Brief at 37-38. But Andrade's reasoning is circular, i.e., he justifies his conclusion by arguing it is an indisputable premise. Moreover, apart from the fact that such circular reasoning is fundamentally flawed, his conclusion is based on a faulty premise. There is obvious disagreement among reasonable minds regarding the proportionality of Andrade's sentence. *See, Andrade v. Attorney Gen. of the State of California*, 270 F.3d at 767-772 (Sneed, J., dissenting); *see, People v. Mantanez*, 98 Cal.App.4th at 363-64.

In any event, as was argued in Petitioner's Brief on the Merits, in evaluating the reasonableness of a state court's merits determination, federal habeas courts do not concern themselves with the intricacies of the state court's reasoning; the only question is whether the state court decision was objectively unreasonable. State courts are not required to use particular language in order to avoid being held to have rendered an unreasonable decision. Petr's. Brief on the Merits, at 30.

In response to Petitioner's proposed definition for what constitutes an objectively unreasonable decision, Andrade again asserts the "susceptible to debate" standard is virtually identical to the "all reasonable jurists" standard rejected in *Williams*. Andrade is incorrect. An "all reasonable jurists" test constitutes a unanimity requirement permitting the views of one judge to have greater weight than the considered judgment of several others. *See, Williams*, 529 U.S. at 377-78. A "susceptible to debate" standard, on the other hand, requires the reviewing court to engage in a process it routinely engages in, i.e., evaluating reasonableness.

Finally, Andrade ignores the fact that the standard of review used by the Ninth Circuit in determining the State court decision was unreasonable, fails to address the reasonableness of the State court's decision and thwarts Congress' purpose in enacting habeas corpus reform. For the reasons previously discussed, Petitioner

urges this Court to establish a workable definition, and to do so by analogy to *Teague*.

Dated: September 5, 2002

Respectfully submitted,

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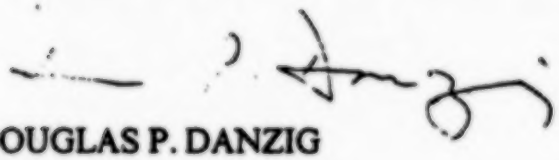

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